

European Court of Human Rights judgments on the right to freedom of expression

Bulletin XLII: FOCUS ON ACADEMIC FREEDOM

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'Academic freedom' is an important element of the right to freedom of expression. Not only do academics – like everyone else in society – have the right to freedom of expression; the Court has recognised that academic freedom itself has an important role to play in democratic society. The ideas and opinions of academics may be controversial and deeply unpopular, but their right to express them is extremely important. This freedom includes a right to criticise politicians and political ideas.

The following cases illustrate how the Court approaches the issue of academic freedom:

- **Mustafa Erdoğan v. Turkey** (Applications nos. 346/04 and 39779/04), 27 May 2014: academic criticism of Turkish judges for dissolving a political party was within acceptable bounds
- **Hertel v. Switzerland** (Application No. 25181/94), 25 August 1998: injunction banning an academic from further publishing his views on microwave ovens violated the right to freedom of expression
- **Sorguç v. Turkey** (Application No. 17089/03), 23 June 2009: defamation conviction for professor for criticising system of academic appointments violated the right to freedom of expression
- **Lombardi Vallauri v. Italy** (Application no. 39128/05), 20 October 2009: dismissal of professor for views that were incompatible with the university's values violated the right to freedom of expression
- **Wille v. Liechtenstein** (Application no. 28396/95) 28 October 1999: banning judge from public office for remarks made during an academic lecture violated the right to freedom of expression
- **Stambuk v. Germany** (Application no. 37928/97) 17 October 2002: fine for scientist who was accused of unlawfully advertising his work in a newspaper report violated the right to freedom of expression

Furthermore, the Council of Europe and European Union have included academic freedom among basic rights in a democratic society and have adopted several resolutions and recommendation.

- **Mustafa Erdoğan v. Turkey** (Applications nos. 346/04 and 39779/04), 27 May 2014: **academic criticism of Turkish judges for dissolving a political party was within acceptable bounds**

This concerned the complaint by a law professor, editor and publisher that they were ordered by the Turkish courts to pay damages to three judges of the Constitutional Court for insulting them in an article in an academic law journal reporting on a decision dissolving a political party. In the article, Mr Erdoğan questioned whether, as a matter of law, the conditions for dissolving the political party were met, which was allegedly operating contrary to the principles of secularism. The article called the impartiality of the judges into question and insinuated that the judges were incompetent. Three of the judges brought defamation proceedings against the applicants, claiming that the article was a serious personal attack on their honour and integrity, and won damages.

The Court held that the conviction violated the professor's right to freedom of expression and that members of the judiciary acting in an official capacity should expect to be subject to wider limits of acceptable criticism than ordinary citizens. Because the article had been written by a law professor and had been published in a law journal, the Court emphasised the importance of academic freedom, holding that this:

“extends to the academics' freedom to express freely their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence. This may include an examination of the functioning of public institutions in a given political system, and a criticism thereof.”

In their concurring opinion, judges Sajó, Vučinič and Kūris further elaborated on the importance of academic freedom. Their opinion states that an important aspect of academic freedom is the ability of scholars to communicate their ideas beyond the academic community, stating that:

“There is no Chinese wall between science and a democratic society. On the contrary, there can be no democratic society without free science and free scholars. This interrelationship is particularly strong in the context of social sciences and law, where scholarly discourse informs public discourse on public matters including those directly related to government and politics.”

They also suggest that the Court should develop a test to determine whether or not speech classifies as 'academic' speech, stating that:

“In determining whether “speech” has an “academic element” it is necessary to establish: (a) whether the person making the speech can be considered an academic; (b) whether that person's public comments or utterances fall within the sphere of his or her research; and (c) whether that person's statements amount to conclusions or opinions based on his

or her professional expertise and competence. These conditions being satisfied, an impugned statement must enjoy the utmost protection under Article 10."

- **Hertel v. Switzerland** (Application No. 25181/94), 25 August 1998: **injunction banning an academic from further publishing his views on microwave ovens violated the right to freedom of expression**

This concerned a scientist whose report on the effects of microwave ovens on food and on health of those who eat the food was used as the basis of an article which called for the banning of microwave ovens. The article included an extract of the report as well as a summary of the findings. An association representing manufacturers of household appliances secured a court order preventing the applicant, on pain of imprisonment or a fine, from making any more statements concerning the safety of food cooked in microwave ovens. The scientist appealed to the European Court of Human Rights.

The European Court held that comes to the conclusion that the injunction violated Mr. Hertel's right to freedom of expression. The Court stated that,

"the effect of the injunction was partly to censor the applicant's work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied".

The Court emphasised that the fact that the academic's view was a minority view was irrelevant:

"It matters little that this opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas"

- **Sorguç v. Turkey** (Application No. 17089/03), 23 June 2009: **defamation conviction for professor for criticising system of academic appointments violated the right to freedom of expression**

This concerned a professor of construction management who distributed a paper at a conference criticising the selection procedure for assistant professors, without mentioning specific names. In response, an assistant professor brought a defamation case against him claiming that certain comments in the paper were an attack on his reputation. The assistant professor was later dismissed from his academic post because of incompetence and because his personal values were found to be incompatible with the university's. The domestic courts, however, found that the article did constitute an attack on the assistant professor's reputation and ordered the professor to pay damages.

The European Court of Human Rights held that Mr Sorguç had expressed his opinion on an issue of public importance - the question of the system for appointments and promotion in universities. He had made his statements on the basis of personal experience, and what he said had been widely known inside the academic community. The Court therefore found that the domestic courts had not given him the opportunity to substantiate his statements and that they

had attached greater importance to protecting the reputation of one unnamed individual than to academic freedom. The Court emphasised the importance of academic freedom, stating that this includes:

“the academics' freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction.”

- **Lombardi Vallauri v. Italy** (Application no. 39128/05), 20 October 2009: **dismissal of professor for views that were incompatible with the university's values violated the right to freedom of expression**

This concerned a legal philosophy professor who had lectured at the Faculty of Law of the Catholic University of the Sacred Heart in Milan, on the basis of a series of annual contracts. In 1998, the post was advertised and the applicant was refused because his views were “in clear opposition to Catholic doctrine” and that “in the interests of truth and of the well-being of students and the University” the applicant should no longer teach there. All his appeals were dismissed.

The European Court of Human Rights held that this violated the professor's right to freedom of expression as well as his right to a fair trial. It noted that the university had not informed the professor to what extent his supposedly unorthodox views were reflected in his teaching work and how they were liable to affect the University's interests. The University's interest in providing teaching that was based on academic values could not justify violating the procedural guarantees inherent in the right to freedom of expression.

- **Wille v. Liechtenstein** (Application no. 28396/95) 28 October 1999: **banning judge from public office for remarks made during an academic lecture violated the right to freedom of expression**

This concerned a judge who gave a public lecture in which he criticised the Prince of Liechtenstein in the context of a wider controversy around Liechtenstein's accession to the European Economic Area. The Prince subsequently wrote to the judge, disagreeing with the criticism and disqualifying him from holding a public office. When he was subsequently proposed by parliament for a further term of office as President of the Administrative Court, the Prince refused to appoint him.

The Court found that this violated the judge's right to freedom of expression. It noted that the judge's remarks had been made during a series of academic lectures on questions of constitutional jurisdiction and fundamental rights. Because his lecture dealt with constitutional law and the question whether the Prince was subject to the jurisdiction of a constitutional court, it inevitably had political implications. However, this alone should not have prevented the applicant from making any statement on this matter. His opinion on the matter was shared by a considerable number of others and the lecture had not contained any remarks on pending cases, severe criticism of persons or public institutions or insults to high officials or the Prince.

- **Stambuk v. Germany** (Application no. 37928/97) 17 October 2002: **fine for scientist who was accused of unlawfully advertising his work in a newspaper report violated the right to freedom of expression**

This concerned an ophthalmologist who had been interviewed by a journalist about a new form of laser treatment that he performed. He had stated that the risks of the treatment were low and that he had treated more than 400 patients with a 100% success rate. He was subsequently fined by the Disciplinary Court for Medical Practitioners for disregarding the ban on advertising for medical practitioners on the grounds that the aim of the article had been self-promotion.

The European Court held that this violated the right to freedom of expression. The Court observed that medical practitioners had a duty of care towards the individual and the local community which might explain certain restrictions on their conduct, including rules on their public communications or participation in public communications on professional issues. However, these rules of conduct in relation to the press had to be balanced against the legitimate interest of the public to obtain information. They should not be interpreted as putting an excessive burden on medical practitioners to control the content of press publications. The article in question gave a balanced explanation of the new technique and was not incorrect or misleading.

Charter of Fundamental Rights of the European Union

Article 13 of the EU Charter explicitly protects freedom of the arts and sciences: “The arts and scientific research are free. Academic freedom is respected”.

Council of Europe Recommendations and other statements

- Recommendation CM/Rec (2012)7 of the Committee of Ministers to member States on the responsibility of public authorities for academic freedom and institutional autonomy

In this recommendation, the Committee of Ministers state that:

- Academic freedom and institutional autonomy are essential values of higher education, and they serve the common good of democratic societies.
- Academic freedom should guarantee the right of both institutions and individuals to be protected against undue outside interference, by public authorities or others. It is an essential condition for the search for truth, by both academic staff and students, and should be applied throughout Europe. University staff and/or students should be free to teach, learn and research without the fear of disciplinary action, dismissal or any other form of retribution.
- Institutional autonomy should not impinge on the academic freedom of staff and students. Public authorities should provide a framework based on trust and respect within the academic community. Only in a climate of confidence can higher education fully serve open democratic societies and encourage their development through freedom of thought and critical and creative thinking.

- Recommendation 1762 (2006) of the Parliamentary Assembly of the Council of Europe

This Recommendation by the Parliamentary Assembly of the Council of Europe states that:

- academic freedom in research and in training should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and distribute knowledge and truth without restriction
- history has proven that violations of academic freedom and university autonomy have always resulted in intellectual relapse, and consequently in social and economic stagnation

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